No. 82-1795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAMMONS COMMUNICATIONS, INC.,
Petitioners,

v.

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF FOR PETITIONERS COX CABLE OF OKLAHOMA CITY, INC., MULTIMEDIA CABLEVISION, INC., SAMMONS COMMUNICATIONS, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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I. OKLAHOMA'S ADVERTISING BAN IS PREEMPTED BY FEDERAL LAW.

Misconstruing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) and *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), Respondent asserts that traditional Supremacy Clause analysis is inapplicable because the Twenty-first Amendment creates state interests which must be balanced against the federal

interest in a nationwide communications policy.[1] In *Midcal* and *Hostetter* the Court addressed the effect of the Twenty-first Amendment on the federal government's power to regulate liquor commerce, declaring that the competing federal and state interests in the Commerce Clause and Twenty-first Amendment must be reconciled.[2] The present case presents no such conflict between federal and state powers over liquor commerce.[3] Rather, the federal interest concerns a uniform, nationwide communications system which protects the rights of viewers, copyright owners, advertisers and cable operators. Consequently, a balancing of interests is inappropriate, and directly conflicting federal laws render application of the Oklahoma advertising ban to Petitioners invalid.[4]

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[1] Brief of Respondent ("Resp. Br.") at 44.

[2] The Court in *Hostetter* sought to avoid the "patently bizarre" and "demonstrably incorrect" conclusion that the Twenty-first Amendment left Congress "with no regulatory power over interstate or foreign commerce." 337 U.S. at 332. Similarly, in *Midcal*, reconciliation of the competing state and federal interests was suggested because "there is no bright line between federal and state powers over liquor." 445 U.S. at 110.

[3] For this reason *Castlewood Int'l Corp. v. Simon*, 596 F.2d 638 (5th Cir. 1979), *vacated and remanded sub nom. Miller v. Castlewood Int'l Corp.*, 446 U.S. 949, *panel opinion reinstated*, 626 F.2d 1200 (5th Cir. 1980), is inapplicable because the federal provision there directly regulated liquor commerce. *See United States v. Texas*, 695 F.2d 136, 139 (5th Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 336 (1983), where the Fifth Circuit emphasized the narrow limits of its holding in *Castlewood*. *See also Dunagin v. City of Oxford*, 718 F.2d 738, 753 (5th Cir. 1983) (en banc) where the Fifth Circuit found it "exceedingly unlikely" that the Twenty-first Amendment could justify the State of Mississippi's banning all out-of-state cable signals containing liquor advertisements in the face of, *inter alia*, the Supremacy Clause.

[4] Respondent's reading of *Midcal* is similarly flawed to the extent it interprets that decision to support a liquor advertising ban as incident to the state's powers under the Twenty-first Amendment. Resp. Br. at 32. Neither *Midcal* nor any other decision of this Court has held or implied that regulation of interstate liquor advertising by entities not engaged in liquor commerce is incident to the state's power to regulate the transportation and importation of alcoholic beverages. Rather, this Court has repeatedly found that Section 2 of the Twenty-first Amendment was "designed only to augment the powers of the States to regulate the importation of liquor destined for use, distribution or consumption in its own territory, not to 'increase its jurisdiction.'" *United States v. Tax Comm'n of Mississippi*, 412 U.S. 363, 378 (1973) (quoting *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938)).

Even if balancing is appropriate, Respondent misstates the test. The state's interest in promoting temperance *per se* is not balanced against the federal interest in a uniform, nationwide communications policy. Rather, the Court must measure the demonstrated effectiveness of the advertising prohibition in advancing the state's interest against the federal interest. *Midcal*, 445 U.S. at 113-114. The effectiveness of Oklahoma's blanket advertising ban as applied to cable television programming is "unsubstantiated." *Id.* Respondent made no factual showing that application of the advertising ban to cable television programming will assist in achieving the state's goals. Widespread availability in Oklahoma of other media containing liquor advertisements, and the fact that the state only recently attempted to enforce the prohibition against Petitioners, show that the advertising ban does not cognizably further the state's interest.[5] Thus, under *Midcal*, application of the advertising ban to Petitioners is invalid.

II. OKLAHOMA'S ADVERTISING BAN VIOLATES THE FIRST AMENDMENT.

Taking great liberty with the record, Respondent argues that it is "not impossible" for cable operators to delete wine commercials from their programming, so that Oklahoma's advertising ban does not "materially affect the dissemination of non-commercial or other commercial programming."[6] The undisputed testimony in the record shows that deleting wine commercials would be "extremely impractical" and would have "[a] very heavy economic effect" on cable operations.[7] The District Court found that "there exists no feasible way for . . . [cable operators] to block out the [wine] advertisements."[8] The Tenth Circuit did not disturb this finding but

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[5] In striking down the application of Oklahoma's advertising prohibition to Petitioners, the District Court recognized that Petitioners "are prohibited from disseminating advertisements of something the public already knows from experience and from reading newspaper and magazine advertising—that alcoholic beverages exist and are for sale at certain prices." Appendix to the Petition for Certiorari ("PA") at 45a. *See also* PA at 5a n.1, 23a-24a.

[6] Resp. Br. at 97, 99.

[7] Joint Appendix ("JA") at 26, 30, *see also id.* at 29, 32, 37, 39.

[8] PA at 41a.

echoed the District Court, concluding that "cable operators especially are placed in a difficult position" because of the advertising prohibition. *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 502 (10th Cir. 1983). The FCC also concluded, contrary to Respondent's assertions, that deletion of commercials by cable operators is unworkable, *Cable Television Report and Order*, 36 F.C.C.2d 143, 165 (1972), and would be a "prohibitively burdensome task."[9]

Semantic arguments over the words "impracticable," "impossible" and "infeasible" are not helpful. Because of the economic and technical burdens of deleting wine advertising from cable programming, Oklahoma's sweeping prohibition, if upheld, would prevent cable operators from carrying out-of-state signals that contain an abundance of political and artistic expression and a variety of commercial messages for products and services other than alcoholic beverages.[10] This is an unjustified prior restraint on cable operators' editorial discretion.[11]

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[9] *See* Brief of the Federal Communications Commission as Amicus Curiae Supporting Petitioners at 16.

[10] Regardless of the particular label attached to speech, this Court "may not escape the task of assessing the First Amendment interest at stake." *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 91 (1977). Every restriction on commercial speech "must be examined carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." *Bolger v. Youngs Drug Products Corp.*, ____ U.S. ____, 103 S.Ct. 2875, 2880 (1983); *see also Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 570 (1980).

[11] *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 569-570 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971). Even if the advertising ban affected only wine commercials on cable programming, the state's prohibition must nevertheless fail. The blanket restriction on the "free flow of truthful information" concerning alcoholic beverages "constitutes a 'basic' constitutional defect regardless of the strength of the government's interest." *Bolger*, 103 S.Ct. at 2885 (quoting *Linmark*, 431 U.S. at 95-96).

Respondent argues that the prohibited advertising is entitled to reduced constitutional protection because it is delivered by the electronic media. Resp. Br. at 68-71. Whatever may be the parameters of legitimate governmental regulation of the television broadcast medium with its scarcity of frequencies,

(footnote continues)

Respondent argues that actual proof of the advertising ban's directly advancing the state's interest is not required if the legislative judgment underlying the prohibition is not "manifestly unreasonable."[12] This Court's decisions do not support Respondent's reliance on legislative reasonableness to sustain its burden of justifying a restriction on commercial speech.[13] Moreover, this Court has consistently rejected the notion that judicial deference to legislative judgment is required under the Twenty-first Amendment where liquor regulations substantially interfere with constitutional guarantees.[14]

Respondent also argues that the advertising ban is no more extensive than necessary to further the state's interest in re-

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(footnote continued)

see e.g., Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 101 (1973), such limits are inapplicable to the cable television medium, *see Bolger*, 103 S.Ct. at 2884, and, in any event, are exceeded where, as here, the state severely impedes the free flow of political and artistic programming merely because it includes truthful commercial advertising for wine products.

[12] Resp. Br. at 87-89.

[13] *See e.g., Bolger*, 103 S.Ct. at 2882 n.20, 2884; *Central Hudson*, 447 U.S. at 569 (Court rejects as "tenuous" state agency determination that an advertising ban advanced state's interest in equitable and efficient utility rates). *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), does not require a different conclusion. Unlike the regulation involved here, the billboard ban in *Metromedia* did not single out speech of a particular content, and the Court specifically noted the absence of any claim that San Diego was attempting to suppress speech. *Id.* at 510. Considering the First Amendment's hostility to content-based regulation, judicial deference to rational legislative judgments is inappropriate where, as here, the state regulation is based on the subject matter of the speech. *Id.* at 519; *Schneider v. New Jersey*, 308 U.S. 147, 161; *see also Metromedia*, 453 U.S. at 528-531 (Brennan, J., concurring in judgment); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 72-74 (1981).

[14] *See e.g., Larkin v. Grendel's Den, Inc.*, ____ U.S. ____, 103 S.Ct. 505, 510 (1982) (deference to legislative judgment not required when liquor regulation violates the Establishment Clause of the First Amendment); *Craig v. Boren*, 429 U.S. 190, 200-04, 206 (1976) (rejecting legislative judgment that gender-based liquor regulation promoted traffic safety); *cf. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 112-14 (1980) (rejecting state legislative judgment that liquor resale price maintenance promoted temperance and orderly market conditions).

ducing alcohol consumption and intemperance among its population.[15] The record in this case makes such an argument untenable. There is no showing by the state that less restrictive measures would be ineffective, as required by *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 570-71 (1980). Nothing in the record describes a failed effort by the state to proceed along a less restrictive path. *See In re R.M.J.*, 455 U.S. 191, 201 (1982). As the District Court found, "[i]t is not clear that an absolute prohibition of advertising is the only solution."[16] Absent such a showing, the state failed its burden under *Central Hudson*. *See Bolger v. Youngs Drug Products Corp.*, ____U.S.____, 103 S.Ct. 2875, 2882 n.20 (1983); *R.M.J.*, 455 U.S. at 201.[17]

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[15] Resp. Br. at 91-94.

[16] PA at 49a.

[17] Respondent also argues that FCC regulations and federal copyright law prohibiting commercial deletions unconstitutionally abridge Petitioners' editorial discretion. Resp. Br. at 19-25. Respondent failed to raise this argument in the lower courts and therefore cannot do so here. *See, e.g., Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 324-25 (1972); *Wiener v. United States*, 357 U.S. 349, 351 (1958); *see also* Sup. Ct. R. 21.1(a). Additionally, Respondent has no standing to challenge the constitutional validity of these federal provisions, even under the most strained interpretation of the "overbreadth" doctrine. *New York v. Ferber*, 458 U.S. 747, 767-73 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). Moreover, Respondent's position is self-defeating because the Oklahoma advertising ban, if enforced, would interfere with Petitioners' editorial discretion more than the federal regulation, and would thus be invalid under the same rationale.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Petitioners' initial brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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